

**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

FRANK DEWAARD, JOHN MUELLER,	)	Thomas E. Hart and
ATLANTIC CLAM HARVESTERS	)	Peter M.S. Bryson
LIMITED, SFT VENTURE,	)	for the appellants
MARICULTURE (PEI) LTD. and CLAUDE	)	
ALLEN	)	
	)	
Appellants	)	
	)	
- and -	)	
	)	
RALPH WIDRIG and	)	Martin C. Dumke and
LAURELLE WIDRIG	)	Shawn M. O'Hara
	)	for the respondents
Respondents	)	
	)	
	)	
	)	Application heard:
	)	September 9, 1999
	)	
	)	Decision delivered:
	)	September 10, 1999
	)	
	)	

**BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS**

**CROMWELL, J.A.: (in Chambers)**

[1] This is an application by the appellants for a stay of an order of Carver, J. which is the subject of this appeal. The appellants also apply to set the appeal down for hearing.

[2] The respondents on the appeal (plaintiffs in the intended action) applied to Carver, J. and were granted an *ex parte* order requiring the appellants (defendants in the intended action) to, among other things, pay money into court, reinstall certain equipment on the vessel "JUST FOR FUN", refrain from removing and/or alienating any property of the intended defendant Atlantic Clam Harvesters Limited and, in respect of the appellant Claude Allen, to refrain from transferring a certain fishing license. The order also required the respondents (plaintiffs in the intended action) to pay \$10,000 US into Court prior to the order being issued, set dates of Nov 8, 9 and 10, 1999 for trial of the action and provided that "...the injunction application be reviewed *inter partes* on the first day of trial."

[3] The appellants have filed the affidavit of Frank deWaard, one of the appellants, which advances a considerably different version of the facts than was placed before Carver, J in three affidavits filed by or on behalf of the respondents. Of course, the Chambers judge had only the latter affidavits before him when he made his order.

[4] The appellants say that the *ex parte* order was improper because, in their

submission, the material filed by the respondents did not allege urgent circumstances or danger of prejudice if notice were given. Further, the appellants say that the respondents failed to make full and frank disclosure before Carver, J as they were required to do on an *ex parte* application. They put forward evidence which they claim demonstrates that no money is owed by SFT Venture to Atlantic Clam Harvesters and that it should not have been ordered to pay money into Court on this account. The respondents have filed material disputing these claims.

[5] Civil Procedure Rule 43.01(5) provides that:

On two (2) days notice or on such shorter notice as the court may prescribe an opposing party may apply for the dissolution or modification of an order for an interim injunction, and the court shall hear and determine the application as expeditiously as is just.

[6] The appellants are apparently of the view that the order granted by Carver, J. precludes resort to this rule because the order specifies that there will be an *inter partes* review of the order on November 8, the first of the three days set for trial. In essence, the stay application to this Court is an application to review the granting of the *ex parte* order which, under Rule 43.01(5), should be done in the Supreme Court and, if possible, before the judge issuing the order.

[7] I do not interpret Carver, J.'s order as foreclosing an application under Rule 43.01(5) prior to the November 8 date to which it refers. Rule 43.01(5) appears to me to give a discretion to shorten, not to lengthen, the two day notice period for such an application. It is obviously preferable for these issues to be resolved in the Supreme

available to me for review and there is conflicting affidavit evidence. There are not even, as yet, any pleadings to review in the main action. The appellant's concern about the meaning of the order is, itself, a reason why the review should be conducted in the Supreme Court. All of this is to say that the stay application in these circumstances is not very well suited to adjudication in the Court of Appeal. I agree with both counsel that the appropriate mechanism to review whether the *ex parte* order should continue in force, or be modified, is that set out in Rule 43.01(5).

[8] With the consent of counsel, I therefore will adjourn this application to September 30th to allow counsel for the appellants to apply to the Supreme Court under Rule 43.01(5).

[9] In the interim, and with the agreement of counsel, I will stay the mandatory portions of the order of Carver, J., namely, paragraphs (d), (e) and (g) until further order of the Supreme Court or until September 30, whichever shall first occur. Counsel for the appellants undertakes that the appellants will preserve the equipment removed from the vessel for the same period.

[10] The application for the stay and the application to set the appeal down for hearing are both adjourned to Sept 30. Counsel will submit an order for signature.

A handwritten signature in black ink, appearing to read "J.A. Cromwell", written in a cursive style. The signature is positioned above a horizontal line.

Cromwell, J.A.